No. 89-7175-CFY
Status: DECIDED

Title: Darrell Beaulieu, Petitioner
v.
United States

Docketed:
April 9, 1990

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Otto,Susan

Counsel for respondent: Solicitor General

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Apr 9 1990 | D | Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. |
| 4 | May 11 1990 | | Order extending time to file response to petition until June 8, 1990. |
| 5 | Jun 4 1990 | | Brief of respondent United States in opposition filed. |
| 6 | Jun 6 1990 | | DISTRIBUTED. June 21, 1990 |
| 7 | Jun 12 1990 | X | Reply brief of petitioner Darrell Beaulieu filed. |
| 9 | Jun 22 1990 | | REDISTRIBUTED. June 27, 1990 |
| 11 | Jun 28 1990 | | Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.) |

**********

89-7175

Supreme Court, U.S.
FILED
Apr. 9, 1990
JOSEPH F. SPANIOL, JR.
CLERK

CAUSE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ORIGINAL

DARRELL BEAULIEU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Darrell Beaulieu, the petitioner, by and through his attorney who was previously appointed under the Criminal Justice Act by the United States Court of Appeals for the Tenth Circuit, moves this Court for an order allowing petitioner to proceed in forma pauperis on his petition for writ of certiorari. Pursuant Rule 39.2 of this Court and 18 U.S.C. §3006A(d)(6), petitioner is not required to submit the affidavit described in 28 U.S.C. §1915(a) and prescribed in Form 4 of the Federal Rules of Appellate Procedure.

Respectfully submitted,

SUSAN M. OTTO
ASSISTANT FEDERAL PUBLIC DEFENDER
SUITE 524, 215 DEAN A. McGEE AVENUE
OKLAHOMA CITY, OKLAHOMA 73102
(405) 231-5725 (or) (FTS) 736-5725
COUNSEL FOR PETITIONER
DARRELL BEAULIEU

CERTIFICATE OF SERVICE

I hereby certify on this 6th day of April, 1990, a true and correct copy of the above and foregoing Motion to Proceed In Forma Pauperis was mailed to Kenneth W. Starr, Solicitor General, Department of Justice, 10th and Constitution Avenue, Washington, D.C. 20054, counsel for respondent and Tim Leonard, United States Attorney for the Western District of Oklahoma, 4434 United States Courthouse, 200 N. W. 4th, Oklahoma City, Oklahoma 73102.

SUSAN M. OTTO

CAUSE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1989 TERM

DARRELL BEAULIEU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RECEIVED
APR - 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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COUNSEL FOR PETITIONER
DARRELL BEAULIEU

(a) The Question Presented for Review Expressed in the Terms and Circumstances of the Case.

(1) Whether petitioner Darrell Beaulieu was denied due process of law by the district court's factual determination he was a leader or organizer of criminal activity when that determination was based on trial testimony of coconspirators Mr. Beaulieu was not permitted to confront or cross-examine.



(b) List of all Parties to the Proceeding

Petitioner Darrell Beaulieu is the only party seeking review of this judgment. Therefore, the caption of the case reflects all parties to the proceeding.

(c) Table of Contents and Table of Authorities

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(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The opinion of which review is sought was filed January 10, 1990;

(ii) Date of any order respecting rehearing.

Rehearing was denied February 28, 1990;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

The petition involves a denial of due process resulting from the district court's reliance on testimony originating from the trial of coconspirators in making a factual determination Mr. Beaulieu was a leader or organizer of criminal activity under U.S.S.G. §3B1.1(a).

(f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . U.S. Const. Amend. V.

(2) Statute Involved:

None.

(3) Rules involved:

United States Sentencing Guidelines, §3B1.1(a).

(g) Concise Statement of the Case.

Mr. Beaulieu was charged by a superseding indictment filed June 21, 1988. Count One charged Mr. Beaulieu with conspiring with seven co-defendants to manufacture amphetamine in violation of 21 U.S.C. §846.

Count Three charged Mr. Beaulieu with attempting to manufacture eighteen (18) ounces of amphetamine on or about May 20, 1986, in violation of 21 U.S.C. §841(a)(1). Count Six charged Mr. Beaulieu with manufacturing three (3) ounces of amphetamine, in violation of 21 U.S.C. §841(a)(1). Count Seven charged Mr. Beaulieu with manufacturing three (3) ounces of amphetamine, in violation of 21 U.S.C. §841(a)(1). Count Eight charged Mr. Beaulieu with using a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1).

On July 25, 1988, Mr. Beaulieu entered a plea of guilty pursuant a plea agreement with the United States. In accordance with the agreement, Mr. Beaulieu entered a plea of guilty to Counts One and Three of the superseding indictment. In exchange for the pleas of guilty, the government agreed to dismiss Counts Six, Seven and Eight of the superseding indictment.

On September 29, 1988, Mr. Beaulieu was sentenced to incarceration for a term of 98 months on Counts One and Three. Mr. Beaulieu appealed to the United State Court of Appeals for the Tenth Circuit. The circuit court affirmed Mr. Beaulieu's sentence. United States v. Beaulieu, 893 F.2d 1177 (10th Cir. 1990). Rehearing was denied on February 28, 1990.



The following facts are material to the consideration of the question provided:

Mr. Beaulieu appeared for sentencing September 29, 1988. Mr. Beaulieu challenged the sufficiency of the evidence supporting the probation officer's conclusion Mr. Beaulieu was an organizer or leader of the criminal activity in which he was engaged. The only evidence presented on this issue was the testimony of Darrell Beaulieu.

Mr. Beaulieu testified while he was involved in the amphetamine manufacturing process with co-defendant Russell Allen, Mr. Allen was the organizer of the activity.

The court found the evidence was sufficient to conclude Mr. Beaulieu was an organizer or leader of the criminal activity charged in the superseding indictment. The sentencing court relied on testimony it heard from the trial of Mr. Beaulieu's two brothers. These individuals were a part of the same conspiracy in which Mr. Beaulieu was convicted of participating. Several witnesses at the trial named Mr. Beaulieu as the leader of the operation.

The result of this finding was a four level increase in Mr. Beaulieu's offense level under the Sentencing Guidelines resulting in a substantial increase in punishment.

(h) Review of the Judgment of a State Court.

Not applicable.

(i) Review of the Judgment of a Federal Court.

Federal jurisdiction was established in the first instance by the initiation of a federal criminal prosecution under the ambit of 21 United States Code §§ 846, 841(a)(1). Appellate review of the Sentencing Guidelines issue was expressly authorized by 18 United States Code §3742(a)(1) and (2).

(j) Direct and Concise Argument Amplifying the Reason Relied on for the Allowance of the Writ.

This case presents the specific question whether the sentencing court may rely on testimony from the trial of coconspirators, in making factual determinations under the Sentencing Guidelines, resulting in a quantifiable increase in punishment in derogation of the defendant's right to confront and cross-examine the witnesses' testimony.

Mr. Beaulieu challenged the district court's factual determination he was an organizer or leader of the criminal activity in which he was involved. Specifically, Mr. Beaulieu challenged the district court's reliance on testimony elicited during the trial of Mr. Beaulieu's co-conspirators. Mr. Beaulieu was not present at this trial and therefore did not have an opportunity to cross-examine witnesses, object to testimony or take the witness stand and answer allegations made against him. Mr. Beaulieu contends the district court's reliance on this testimony constituted fundamental error.

The Tenth Circuit's ruling in this case is in conflict with the United States Court of Appeals for the Eleventh Circuit.



The case of United States v. Castellanos, 882 F.2d 474 (11th Cir. 1989) supports Mr. Beaulieu's argument. In Castellanos the sentencing judge relied on testimony from the trial of the defendant's co-conspirators. The Eleventh Circuit held, "[T]his reliance on testimony adduced at the trial of another was fundamental error." Castellanos, 882 F.2d at 476. The Castellanos court reasoned that when a sentencing judge relies on testimony elicited at a co-conspirator's trial, the defendant has no opportunity to make objections to evidence, cross-examine witnesses or present his own case.

The Tenth Circuit, in its opinion of January 10, 1990, states the ruling of the Castellanos court does not acknowledge the distinctions between the guilt and sentencing phase of a criminal proceeding. Further, the court states in its opinion the confrontation and cross-examination requirements applicable to a criminal trial are not applicable to a non-capital sentencing proceeding.

Implementation of the Sentencing Guidelines has created vast changes in sentencing procedure. Mr. Beaulieu submits the Sentencing Guidelines have enhanced the extent to which a defendant's liberty interest can be affected during the sentencing phase of a criminal prosecution by providing quantifiable increases in punishment based upon factual findings of the sentencing court. In view of this analysis, Mr. Beaulieu contends more stringent procedural guarantees are necessary to protect defendants sentenced under the Sentencing Guidelines.

This Court ruled Colorado's Sex Offender Act violated the requirements of due process because the punishment allowed under the Act made one conviction the basis for another proceeding, wherein findings of fact could be made, without due process guarantees, resulting in different criminal punishment. Specht v. Patterson, 386 U.S. 605 (1967)

The Sentencing Guidelines are analogous to the situation this Court faced in Specht. This case is typical of those proceedings under the sentencing guidelines. Findings of fact are made which incrementally increase the punishment the defendant will receive. These findings of fact can and do include facts which are collateral to the offense of conviction. As in Specht, the invocation of the sentencing guidelines often results in criminal punishment as the basis of facts beyond those supporting the underlying criminal conviction. Due process requires the defendant "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examination, and to offer evidence of his own." Specht, 386 U.S. at 610. These requirements are a fundamental necessity in view of the new sentencing scheme effectuated by the Sentencing Guidelines.

The Tenth Circuit's opinion is in conflict with the decision of the United States Court of Appeals for the Eleventh Circuit. This conflict, and the effect of the Tenth Circuit's substantive decision, calls for an exercise of this Court's power of supervision.



(k) Appendix.

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

None;

(ii) Copy of other orders necessary to ascertain the grounds of judgment;

None;

(iii) Judgment sought to be reviewed:

United States v. Darrell Beaulieu, United States Court of Appeals for the Tenth Circuit, Cause No. 88-2586, published under United States v. Beaulieu, 893 F.2d 1177 (10th Cir. 1990).

## CONCLUSION

For the foregoing reasons, Mr. Beaulieu respectfully requests a Petition for Writ of Certiorari issue to review the Order and Judgment of January 10, 1990, of the United States Court of Appeals for the Tenth Circuit in Cause Number 88-2586.

Respectfully submitted,

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COUNSEL FOR PETITIONER
DARRELL BEAULIEU

FILED
United States Court of Appeals
Tenth Circuit

JAN 10 1990

ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | No. 88-2586 |
| | ) | |
| v. | ) | |
| | ) | |
| DARRELL BEAULIEU, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. NO. CR-88-129-P)

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Robert G. McCampbell, Assistant United States Attorney (William S. Price, United States Attorney, with him on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Rand C. Eddy, Assistant Federal Public Defender (David Booth, Federal Public Defender, on the brief) Oklahoma City, Oklahoma, for Defendant-Appellant.

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Before TACHA and SETH, Circuit Judges, and BROWN*, District Judge.

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BROWN, District Judge.

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* The Honorable Wesley E. Brown, Senior Judge, U. S. District Court for the District of Kansas, sitting by designation.

This appeal raises the issue of what information a sentencing judge may consider in making factual determinations under the Federal Sentencing Guidelines.

Appellant Darrell Beaulieu pled guilty in the district court to one count of conspiracy to manufacture amphetamine and one count of attempting to manufacture amphetamine (21 U.S.C. § 846). He was sentenced to a prison term of 98 months.

The district court held an appropriate hearing before imposing sentence upon the defendant. The defendant was given an opportunity to object to the presentence report and to present any relevant information to the court. See Rule 32, Fed.R.Crim.P. One of the issues at the hearing was whether appellant was an "organizer or leader" of a criminal activity under § 3B1.1 of the Guidelines. Section 3B1.1 provides that a defendant's offense level may be increased as follows:

> (a) If the defendant was an organizer or leader of a criminal activity that involves five or more participants or was otherwise extensive, increase by 4 levels.
>
> (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

At the conclusion of the sentencing hearing, the district court found that appellant was an "organizer or leader" of a

criminal activity[1] and increased appellant's sentence under § 3B1.1(a). In reaching this conclusion, the sentencing judge relied on testimony from the trial of appellant's two brothers, who were involved in the same drug conspiracy as appellant.[2] Several witnesses at the brothers' trial gave the details of the drug conspiracy and named appellant as the leader of the operation. Although appellant did not object at the sentencing hearing, he now argues that the sentencing judge committed fundamental error by considering testimony from a separate trial as evidence at appellant's sentencing (citing United States v. Castellanos, 882 F.2d 474 (11th Cir. 1989)).[3] Additionally, appellant argues that the information presented to the court does not support a conclusion that appellant was an "organizer or leader" of the criminal activity.

I. Consideration of trial testimony.

Appellant's first argument is that the sentencing judge erred by considering testimony from a separate trial at appellant's sentencing hearing. We find no constitutional, statutory, or procedural rule, however, that would bar the sentencing judge's consideration of relevant and reliable information of the type used

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[1] Appellant conceded that the criminal activity here had five or more participants or was otherwise extensive.

[2] The district judge who sentenced appellant presided at appellant's brothers' jury trial.

[3] We do not fault counsel for failing to object to the consideration of this testimony. The Castellanos case was decided after appellant's sentencing hearing and we find no other cases holding that the consideration of such testimony is error.



in this case. Plainly, the Federal Rules of Evidence do not apply at sentencing. Fed.R.Evid. 1101(d)(3). Moreover, courts have traditionally been allowed to consider all sources of information in formulating an appropriate sentence: "[N]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Prior to the enactment of the Sentencing Guidelines, the circuit courts had uniformly held that reliable hearsay evidence could be considered in the sentencing determination. See e.g., United States v. Shepard, 739 F.2d 510, 515 (10th Cir. 1984) (The sentencing judge may properly consider uncorroborated hearsay evidence that the defendant has had an opportunity to rebut or explain.); United States v. York, 830 F.2d 885, 893 (8th Cir. 1987), cert.denied, 108 S.Ct. 1047 (1988); United States v. Cusenza, 749 F.2d 473, 478 (7th Cir. 1984); United States v. Lee, 818 F.2d 1052, 1055 (2nd Cir. 1987), cert.denied, 484 U.S. 956. We find nothing in the Guidelines to suggest that a different rule now applies. Section 6A1.3 of the Guidelines provides:

> (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

The Commentary to this section adds:

> In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F.Supp. 751 (D.C. Wis. 1981), aff'd 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2nd Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

It is clear from these passages that the Guidelines were not intended to place new restrictions on the sources of information available to the sentencing judge. United States v. Sciarrino, 884 F.2d 95 (3rd Cir. 1989) ("As a matter of due process . . . the enactment of the Sentencing Reform Act of 1984 requires no different rules with respect to what evidence may be used in determining a sentence than were already in place.") The Guidelines expressly allow the use of any reliable information. When there is reason to question the reliability of the information made available to the judge, the Guidelines endorse the pre-existing practice of allowing the district court to conduct an evidentiary hearing. See Commentary to Sentencing Guideline § 6A1.3 (citing United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2nd Cir. 1979)). In arriving at the appropriate sentence within the Guideline standards, then, the judge may use any reliable source



of information--just as he or she could before the adoption of the Guidelines.

Although United States v. Castellanos, 882 F.2d 474 (11th Cir. 1989) supports appellant's argument, we do not find that case to be persuasive. In Castellanos, as in the instant case, the judge who sentenced the defendant relied on testimony from the trial of the defendant's co-conspirators. The Castellanos court, without any citation of authority, held that a sentencing judge could not rely on testimony adduced at the trial of another in sentencing the defendant. The court reasoned that such evidence could not be used because the defendant had not had an opportunity to object to it or to cross-examine the witnesses whose testimony was used.[4] In our view, this broad holding does not adequately recognize the differences between the guilt phase and the sentencing phase of a criminal proceeding. The Supreme Court has made clear that the constitutional requirements mandated in a criminal trial as to confrontation and cross-examination do not apply at non-capital[5] sentencing proceedings. United States v. Sunrhodes, 831 F.2d 1537, 1543, (10th Cir. 1987) (citing Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed.2d 1337 (1949) and Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959)). Cf. Specht v.

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[4]. It is not clear if the court's decision was grounded in the Due Process Clause of the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, the Sentencing Guidelines, or the Federal Rules of Evidence.

[5] Our discussion does not pertain to capital punishment sentencing procedures. Cf. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) and Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (When sentencing amounts to an additional criminal conviction, the defendant is entitled to the full procedural protections applicable to a fair trial.) Clearly, a defendant at sentencing does not have an absolute right to confront witnesses whose information is made available to the court. Sunrhodes, 831 F.2d at 1543; United States v. Carmona, 873 F.2d 569 (2nd Cir. 1989) ("It is not a denial of due process for the trial judge, when determining sentence, to rely on evidence given by witnesses whom the defendant could neither confront nor cross-examine. [citing Williams v. New York, supra.] The fact that some material, upon which the trial judge relied, had its source in a judicial proceeding in which appellant was not a defendant . . . does not bar its use."). Additionally, as we have already indicated, nothing in the text of the Sentencing Guidelines requires the exclusion of testimony originating from a separate trial.[6] And finally, the Federal Rules of Evidence, which might

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[6]. The Guidelines do not impose any procedural requirements that would bar the use of testimony from a separate trial. Section 6A1.3(b) provides: "The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed.R.Crim.P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence."

Rule 32(a)(1) provides in part:

> At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also --- * * *
> (B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and



bar hearsay evidence from the guilt phase of a trial, do not apply at sentencing. Sunrhodes, supra. We believe the better rule, therefore, is that reliable hearsay--including testimony from a separate trial--may be used at sentencing to determine the appropriate punishment. See United States v. Silverman, 1989 U.S.App. LEXIS 17337 (6th Cir. Nov. 21, 1989); United States v. Sciarrino, 884 F.2d 95 (3rd Cir. 1989). See also United States v. Roberts, 881 F.2d 95, 105 (4th Cir. 1989).

Due process requires that a defendant not be sentenced on the basis of "misinformation of a constitutional magnitude." United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 592, 30 L.Ed.2d 592 (1972). This right is protected by the requirement that the defendant be given adequate notice of and an opportunity to rebut or explain information that is used against him. As it pertains to hearsay information, due process requires that the information used have "some minimal indicium of reliability beyond mere allegation." See Sunrhodes, 831 F.2d at 1542 (citing United States v. Fulbright, 804 F.2d 847, 853 (5th Cir. 1986)). Cf. Commentary to Sentencing Guideline § 6A1.3 ("Any information may be

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> (C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

Rule 32(c)(3) provides in part: "The court shall afford the defendant and the defendant's counsel an opportunity to comment on the [presentence] report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it." See also United States v. Peterman, 841 F.2d 1474, 1484 (10th Cir. 1988), cert.denied, 109 S.Ct. 783.

considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy.'") We find no violation of these standards in the present case. The testimony relied on by the sentencing judge bore sufficient indicia of reliability to warrant its use at sentencing. Numerous witnesses at the Beaulieu brothers' trial named appellant as the leader of the amphetamine operation. This testimony was corroborated by physical and documentary evidence at the trial and by appellant's admissions at his sentencing hearing. We reject appellant's argument that the consideration of this testimony was erroneous.

II. Sufficiency of the information at sentencing.

Appellant's second argument is that the information before the sentencing judge did not support the judge's finding that appellant was an "organizer or leader" of the criminal activity.[7] We review this factual finding under a "clearly erroneous" standard. 18 U.S.C.A. § 3742(e) (West Supp. 1989); United States v. Velasquez-Mercado, 872 F.2d 632, 635 (5th Cir. 1989), cert.denied, 110 S.Ct. 187; United States v. Wright, 873 F.2d 437, 445 (1st Cir. 1989). Thus, we will not reverse the district court unless the court's finding was without factual support in the record, or if after

[7] The district court correctly held that the burden was on the Government to prove this enhancement factor by a "preponderance of the evidence." See e.g., United States v. Burke, 1989 U.S.App. LEXIS 16350 (D.C. Cir. Oct. 31, 1989); United States v. Guerra, 1989 U.S.App. LEXIS 16227 (2nd Cir. Oct. 14, 1989); United States v. Urrego-Linares, 879 F.2d 1234, 1237 (4th Cir. 1989). Although these cases refer to a preponderance "of the evidence," we note that the Federal Rules of Evidence do not apply at sentencing. Fed.R.Evid. 1101(d)(3). We have determined that "evidence," in this context, refers to any information that meets the standards of reliability found in § 6A1.3.



reviewing all the evidence we are left with the definite and firm conviction that a mistake has been made. Bill's Coal Company v. Board of Public Utilities of Springfield, Mo., 887 F.2d 242, 244 (10th Cir. 1989). Our review of the information available to the sentencing judge discloses that the judge's finding was amply supported by the record.

There are several factors that distinguish a leadership and organizational role from one of mere management or supervision. These factors include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. Commentary to Sentencing Guidelines § 3B1.1. The information presented at sentencing in this case showed that the drug conspiracy began with appellant and Russell Allen and that it grew to include numerous other individuals. Russell Allen testified at the sentencing hearing[8] that the conspiracy began when appellant approached him and asked him to help in the manufacture of amphetamine. Allen also stated that appellant asked him to find other individuals to help purchase chemicals and that appellant directed him to rent storage space for the laboratory equipment

[8]. The three Beaulieu brothers were all sentenced at one hearing. Russell Allen testified at the hearing and was available to appellant for cross-examination, although defense counsel chose not to cross-examine him.

used in the manufacturing process. Several "cooks" took place at appellant's house and were concededly under his supervision. Appellant gave several individuals instructions to purchase chemicals. Regina Chester, Clint Bowen, and Virginia McNeill all testified at the trial that appellant was in charge of the amphetamine operation. Indeed, appellant admitted at the sentencing hearing that he had been in charge of the "cooks." He also admitted that he supervised other individuals and that he was entitled to a share of the finished product. Although appellant claimed that Russell Allen was the leader of the conspiracy, appellant admitted that he continued to manufacture amphetamine after Allen was arrested. Taken together, the information available to the judge showed appellant's extensive involvement in the planning and organization of the conspiracy. The judge's conclusion that appellant was an "organizer or leader" of the operation is not clearly erroneous.

The conviction and sentence are AFFIRMED.



UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>DARRELL BEAULIEU,<br>Defendant - Appellant. | ) | No. 88-2586 |

ORDER

Filed February 28, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, SETH, Circuit Judges, and BROWN*, District Judge.

*The Honorable Wesley E. Brown, Senior Judge, U.S. Ddistrict Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

ORIGINAL

No. 89-7175

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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DARRELL BEAULIEU, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the district court committed plain error by relying in part for purposes of sentencing on testimony given at the trial of petitioner's co-conspirators.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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No. 89-7155

DARRELL BEAULIEU, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

BRIEF FOR THE UNITED STATES
IN OPPOSITION

---

## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 893 F.2d 1177.

## JURISDICTION

The judgment of the court of appeals was entered on January 10, 1990. A petition for rehearing was denied on February 28, 1990. The petition for a writ of certiorari was filed on April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his guilty plea in the United States District Court for the Western District of Oklahoma, petitioner was convicted of conspiring to manufacture amphetamine (Count 1), and attempting to manufacture amphetamine (Count 2), both in violation of 21 U.S.C. 864.[1/] The district court sentenced petitioner under the Sentencing Guidelines to concurrent terms of 98 months' imprisonment on each count, to be followed by a five-year period of supervised release. The court of appeals affirmed.

1. As explained in the presentence investigation report (PSI) prepared by the probation office, from November 1985 through May 1988 petitioner directed several persons in a conspiracy that manufactured more than 12 pounds of amphetamine. Petitioner solicited the assistance of his co-conspirators to purchase chemicals and glassware, to act as lookouts, and to manufacture the drug. The persons who manufactured the drug included petitioner, his brothers Ronald and John Beaulieu,[2/] Clint Bowen, Terry Bowen, and Russell Allen, while Regina Chester and Virginia McNeill purchased the chemicals needed to manufac-

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1/ Pursuant to the plea agreement, the government dismissed two additional counts of manufacturing amphetamine, in violation of 21 U.S.C. 841(a)(1) (Counts 6 and 7), and one count of using a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 8). Pet. 5.

2/ Petitioner's brothers were named in the same indictment as petitioner. After being separately tried and convicted, they were sentenced in the same proceeding as petitioner. Gov't C.A. Br. 2.



ture the amphetamine. Over the life of the conspiracy, petitioner and his associates purchased chemicals and supplies on 24 occasions from the Mid-America Chemical Company in Oklahoma City, Oklahoma. See Pet. App. 3; Gov't C.A. Br. 4-5. On the basis of petitioner's admission that he had played a leadership role in the offense, the PSI concluded that his offense level should be increased by four levels under Guidelines § 3B1.1(a).[3/] Gov't C.A. Br. 6.

2. At sentencing, petitioner challenged the conclusion in the PSI that he was a leader or organizer of the amphetamine manufacturing operation (and was thus subject to a four-level increase in his offense level). He argued that he was at most a manager or supervisor (and was thus subject to only a three-level increase in his offense level). It was petitioner's submission that Russell Allen was the organizer or leader of the operation.

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3/ In relevant part, Guidelines § 3B1.1 provides:

Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

See Pet. 6.[4] Nevertheless, during his testimony petitioner admitted that he continued to manufacture amphetamine after Allen's arrest; that Regina Chester assisted him, and he had sent her to purchase chemicals approximately five times; that he had sent Clint Bowen to purchase chemicals eight to ten times; that he had sent Ronald Beaulieu to purchase chemicals; and that he was the "cook," i.e., the chemist, in the amphetamine manufacturing operation. Gov't C.A. Br. 5.[5]

The district judge who sentenced petitioner had presided at the trial of petitioner's brothers. Pet. App. 3 n.2. At that trial, Russell Allen had testified that he was a member of the organization, that he worked mainly with petitioner, whom he knew as "Pete," and that the amphetamine 'cooks" took place at petitioner's house. Regina Chester, Clint Bowen, and Virginia McNeill had testified that they belonged to the organization, and that petitioner was in charge. Terry Bowen, Clint Bowen's brother, had testified that he was a member of the organization, that petitioner directed him to obtain a chemical component of

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4/ Petitioner's 98-month sentence fell in the middle of the guideline range for petitioner if the four-level enhancement was correct. The one-level reduction petitioner sought would have resulted in a guideline range of 78-97 months.

5/ Petitioner conceded that the criminal activity involved five or more participants or was otherwise extensive. Pet. App. 3 n.1.



amphetamine from Ronald Beaulieu, and that he had turned over to petitioner the chemicals he had purchased. Gov't C.A. Br. 4-5.[6] With petitioner's acquiesence, the district court relied on that testimony at sentencing in petitioner's case.[7] Based in part on that testimony, the court found that petitioner was an organizer or leader of the amphetamine manufacturing operation and, pursuant to Sentencing Guidelines § 3B1.1(a), added four points to his base offense level. Pet. App. 2-3; Gov't C.A. Br. 5.

2. The court of appeals affirmed. Pet. App. 1-11. Noting that historically a district court could use any reliable source of information in fixing an appropriate sentence, the court held that neither the Constitution, the Criminal Code, nor the Sentencing Guidelines prohibit a sentencing judge from relying on testimony given at the trial of another person in sentencing a

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6/ Allen, Chester, McNeill, and both of the Bowens testified pursuant to plea agreements with the government. Gov't C.A. Br. 4.

7/ At sentencing, the court had discussed with petitioner's counsel the propriety of relying on the testimony at the brothers' trial (Tr. 60):

> The Court: It's my view, based on the evidence at trial, which I think the law establishes I can consider -- is there any quarrel with that since your client was not a defendant at trial?
>
> [Petitioner's counsel]: I don't have any problem with it. I think the Court can consider it.
>
> The Court: I think I can, too, particularly in light of the one statute that doesn't limit the amount and the type of information I can consider. But I heard an awful lot of testimony about [petitioner] at trial. And in my view, the probation report accurately characterizes his role in the offense. And that adjustment is appropriate in my view.

defendant. Id. at 4-7. The court also held that the evidence on which the district court in this case relied was sufficiently trustworthy to be considered, and in fact was corroborated by petitioner's own admissions at sentencing. Id. at 9.

ARGUMENT

Petitioner claims that he was denied due process of law when the district court, relying in part on testimony given at the trial of his co-conspirator brothers, found at sentencing that he was an organizer or leader of a criminal activity involving five or more participants, rather than a manager or supervisor, as he asserted. That claim does not warrant review by this Court, for several reasons.

1. Petitioner has not preserved his claim because he did not object at the sentencing hearing to the district court's reliance on the evidence from his brothers' trial.[8/] In fact, in response to an inquiry from the district court whether the court could consider that evidence, defense counsel said that "I don't have any problem with it. I think the Court can consider it." Tr. 60. Under these circumstances, petitioner has waived his claim in the absence of plain error. Fed. R. Crim. P. 52(b). But plain error can be found "solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)). Because petitioner does

8/ Petitioner also did not raise this claim in his brief in the court of appeals. See Principal Br. of Defendant-Appellant 1, 5-9.



not contend that the evidence was inaccurate or unreliable, he cannot establish that it was plain error for the district court to rely on it.

Although the court of appeals noted that petitioner had failed to object to the district court's consideration of this evidence, the court of appeals declined to rule that petitioner had waived the issue. The court excused petitioner's failure to object on the ground that at the time of petitioner's sentencing, the Eleventh Circuit had not yet decided United States v. Castellanos, 882 F.2d 474 (1989), a case supportive of petitioner's claim. Pet. App. 3 n.3. But the other decision on which petitioner relies, Specht v. Patterson, 386 U.S. 605 (1967), was decided more than two decades prior to his sentencing hearing. Accordingly, petitioner had the tools to make his objection at sentencing, and cannot now excuse that default on the ground that at the time of his sentencing no court of appeals had adopted the argument he now raises. See Reed v. Ross, 468 U.S. 1 (1984).

2. The decision below is correct. It is well settled that at sentencing a district court has wide discretion to determine what information to consider and what weight to give to it. As this Court has explained, a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446 (1972). The Federal Rules of Evidence are expressly made inapplicable to sentencing hearings. Fed. R. Evid. 1101(d)(3). Moreover, under

the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, all reliable evidence is admissible at sentencing. The Act specifically provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Under the former version of Section 3661, as Congress was aware, S. Rep. No. 307, 97th Cong., 1st Sess. 1219-1220 (1984), the courts had consistently held that even illegally obtained evidence and hearsay (if reliable) could be considered at sentencing. See United States v. Roberts, 445 U.S. 552, 556 (1980); United States v. Reme, 738 F.2d 1156, 1167 (11th Cir. 1984), cert. denied, 471 U.S. 1104 (1985); United States v. Lee, 540 F.2d 1250 (4th Cir.), cert. denied, 429 U.S. 894 (1976).9/

The Sentencing Guidelines embrace those principles. Section 6A1.3 of the Guidelines provides that a district court can consider any reliable evidence, including hearsay, at sentencing. Guidelines § 6A1.3 (Policy Statement).10/ If there is

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9/ In determining the appropriate sentence for a particular defendant, the sentencing judge may even consider evidence of crimes for which that defendant has not been convicted. Williams v. New York, 337 U.S. 241, 244 (1949).

10/ Section 6A1.3 (Policy Statement) of the Guidelines provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard
>
> (continued...)



a question about the reliability of the information available to the court, the Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. Ibid. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). But once the reliability of that information has been established, the court may use it to determine the appropriate punishment. United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 110 S. Ct. 553 (1989); see also United States v. Roberts, 881 F.2d 95, 105-106 (4th Cir. 1989).

At the same time, it is also settled that a court may not rely on "misinformation of a constitutional magnitude" at sentencing. United States v. Tucker, 404 U.S. at 447. But petitioner does not claim that the information on which the district court relied was inaccurate. Instead, he claims that he did not have the opportunity to cross-examine the declarants, and therefore in essence raises a Confrontation Clause claim. The admission of hearsay, however, does not violate the Confrontation Clause if the evidence has sufficient "indicia of reliability" despite the lack of opportunity for cross-examination. See Cruz v. New York, 481 U.S. 186, 194 (1987); Lee v. Illinois, 476 U.S.

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10/ (...continued)
> to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

The accompanying Commentary expressly states that "[r]eliable hearsay evidence may be considered." Guidelines p. 6.2.

530, 543-544 (1986). Accordingly, petitioner errs in claiming that there should be a per se rule forbiding a sentencing court from relying on hearsay evidence at sentencing.

In this case, the court of appeals correctly found that the testimony on which the district court relied at sentencing had "sufficient indicia of reliability to support its probable accuracy," Guidelines § 6A1.3(a). Pet. App. 9. Five witnesses at the trial of petitioner's brothers identified petitioner as the leader and organizer of the amphetamine manufacturing operation. Physical and documentary evidence introduced at the Beaulieu brothers' trial corroborated that testimony, as did petitioner's own admissions at the sentencing hearing in this case. Pursuant to Fed. R. Crim. P. 32(c)(3)(A) and (D), petitioner had notice of the PSI's conclusion that he was an organizer and leader of the criminal activity, and petitioner had an opportunity at the sentencing hearing to rebut that conclusion. Accordingly, the requirements of due process were satisfied. See United States v. Sciarrino, 884 F.2d at 97; United States v. Sunrhodes, 831 F.2d 1537, 1542 (10th Cir. 1987). Unfortunately for petitioner, his testimony at the sentencing hearing confirmed, rather than rebutted, both the PSI's conclusion and the reliability of the testimony at his brothers' trial. Under these circumstances, the court of appeals properly concluded that the district court did not err when it considered the testimony from the trial of petitioner's brothers.



3. Petitioner claims that the decision below conflicts with the Eleventh Circuit's decision in United States v. Castellanos, supra. Castellanos held that evidence at a separate trial could not be considered at a sentencing proceeding on the issue of the amount of narcotics the defendant possessed. The Eleventh Circuit reached that conclusion on the ground that the defendant had not had the opportunity to cross-examine witnesses, make objections, or put on evidence at the other trial. 882 F.2d at 477 & n.3.

We submit that the Eleventh Circuit's analysis is wrong. It would appear to foreclose reliance by a sentencing court not only on evidence introduced at another trial, but also on all forms of hearsay, a result that it seems unlikely the Eleventh Circuit intended. That approach would be inconsistent with 18 U.S.C. 3661, with the Federal Rules of Evidence, and with Section 6A1.3 of the Sentencing Guidelines, and it is not required by the Confrontation Clause. The Eleventh Circuit decided the evidentiary question in Castellanos without the benefit of briefing on the issue, and it did not consider the effect of 18 U.S.C. 3661, Fed. R. Evid. 1101(d)(3), Sentencing Guidelines § 6A1.3, or this Court's Confrontation Clause decisions. Until the Eleventh Circuit has the opportunity to consider the effect of these authorities on the position it took in Castellanos, it is not entirely clear that that court will adhere to the views it expressed in that case.

In any event, defense counsel in this case acquiesced in the district court's reliance on the evidence from petitioner's brothers' trial. Although the court of appeals reached the merits and did not rely on waiver principles in this case, the explicit waiver by counsel is sufficient to distinguish this case from Castellanos and makes it unnecessary for this Court to address the conflict in reasoning between the two cases. Moreover, in Castellanos after the evidence from the separate trial had been excluded, the only evidence remaining before the district court was the defendant's stipulation in his plea agreement, and that evidence did not support the sentence imposed. 882 F.2d at 477. In this case, by contrast, even if the testimony from the trial of petitioner's brothers had been excluded, petitioner's own testimony at the sentencing hearing, including his admission that he had continued to manufacture amphetamine after Russell Allen's arrest, provided an independent basis for the district court's determination that petitioner was the organizer or leader of the amphetamine manufacturing organization.11/

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11/ Specht v. Patterson, supra, on which petitioner also relies, Pet. 9, is inapposite. In Specht, the Colorado Sex Offenders Act permitted a defendant to be sentenced to an indeterminate term of one day to life without notice or a full hearing. By contrast, petitioner enjoyed a panoply of procedural safeguards, including notice, a hearing, the assistance of counsel, and the opportunity to present favorable evidence and to rebut adverse evidence. Moreover, Specht specifically adhered, 386 U.S. at 608, to Williams v. New York, 337 U.S. at 245, 249-250, which held that due process did not prohibit a sentencing judge from considering information gathered from witnesses whom the defendant had neither confronted nor cross-examined.
(continued...)



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1990

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11/ (...continued)
Finally, since Specht the Court has made clear that the Confrontation Clause does not exclude all hearsay evidence. See Cruz, 481 U.S. at 194; Lee, 476 U.S. at 543-544.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DARRELL BEAULIEU,
PETITIONER

vs.

No. 89-7175

UNITED STATES OF AMERICA

## CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on June 4, 1990.

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CAUSE NO. 89-7175

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1989 TERM

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DARRELL BEAULIEU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1989 TERM

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DARRELL BEAULIEU,

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Respondent.

---

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The government urges denial of the petition on the ground petitioner has waived the due process issue. The government states the Tenth Circuit Court of Appeals declined to hold Mr. Beaulieu waived the issue. Brief in Opposition, p. 6. Petitioner submits a more accurate statement would be that "waiver" was not an issue before the Tenth Circuit.

In all fairness to petitioner and the Tenth Circuit, it is undisputed the quality and quantity of evidence supporting the district court's finding was the critical issue on appeal. See Principal Brief of Defendant-Appellant, 5-9. The due process



issue raised by petitioner falls within the bounds of the argument raised in the Tenth Circuit. The Tenth Circuit's resolution of the issue supports such conclusion.

Moreover, the novelty of practice and procedure under the Sentencing Reform Act of 1984 militates against a finding an issue of Constitutional magnitude has been waived. The Tenth Circuit made a finding counsel was not at fault for failing to raise an objection to the trial court's proposed inclusion of the information elicited at the trial of the coconspirators. The Tenth Circuit held no other cases were found barring the consideration of the testimony of codefendants at a separate trial. Before the Tenth Circuit, petitioner relied on United States v. Castellanos, 882 F.2d 474 (11th Cir. 1989), which was decided after Mr. Beaulieu's sentencing. The Tenth Circuit expressed no reservation in resolving the issue, despite the lack of objection by counsel at the sentencing hearing. The Tenth Circuit expressly considered the due process issue in resolving Mr. Beaulieu's appeal.

Similarly, the government argues petitioner had the tools to make his due process objection at sentencing and that default is not cured by the lack of authority supporting his position at the time of sentencing. Brief in Opposition, p. 7. The "tools" the government refers to is petitioner's reliance on Specht v. Patterson, 386 U.S. 605 (1967), in support of his claimed denial of due process.

Petitioner does not rely on Specht v. Patterson as dispositive authority on acceptable practice and procedure under the Sentencing Reform Act of 1984. There is no dispositive authority. The Specht decision has an impact on the Constitutional issue raised by petitioner only by way of analogy. Petitioner cited Specht as analogous authority. The government tacitly acknowledges the limited applicability of Specht: the government urges Specht is inapposite. Brief in Opposition, p. 12, n. 11. Since the government cannot contend Specht is dispositive authority, its paradoxical reliance on Specht as grounds for concluding petitioner Darrell Beaulieu waived his right to raise his due process issue is unpersuasive.

## CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify on this the 12th day of June, 1990, a true and correct copy of the above and foregoing Brief was served on:

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SUSAN M. OTTO

# SUPREME COURT OF THE UNITED STATES

## DARRELL BEAULIEU *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 89-7175. Decided June 28, 1990

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The issue presented is whether a district judge may rely on testimony from the trial of a defendant's co-conspirators in sentencing the defendant. The Tenth Circuit held that the district court's reliance on such evidence did not violate any constitutional provision. The Tenth Circuit expressly rejected the position adopted by the Eleventh Circuit which has concluded that reliance on such testimony violates a defendant's rights. See *United States* v. *Castellanos*, 882 F. 2d 474 (CA11 1989). I would grant certiorari to resolve the conflict.

Rule 10 of the Rules of the Supreme Court "indicate the the character of reasons" that will be considered in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between two courts of appeals, between a court of appeals and the highest court of a state, or between two state courts of last resort. These considerations frequently lead to granting certiorari. Just this past Monday, we granted certiorari in two cases that, absent conflict between courts of appeals, very likely would not have been granted. *Dole* v. *Occupational Safety & Health Review Com'n, et al.*, No. 89-1541, cert. granted June 25, 1990; *Business Guides* v. *Chromatic Communications, et al.*, No. 89-1500, cert. granted June 25, 1990. This is a weekly occurrence, but it also regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out

by Rule 10. This case is one of them, and there are many others this Term, as there have been in other Terms.

As of June 21, I had noted my dissent from denial of certiorari 67 times during this Term. My notes on these dissents indicate that on 48 occasions I dissented because in my view there were conflicts among courts of appeals sufficiently crystallized to warrant certiorari if the federal law is to be maintained in any satisfactory, uniform condition. In 7 other cases, there were differences on the same federal issue between courts of appeals and state courts; in another case state courts of last resort differed with each other. Finally, there were 11 cases that did not involve a conflict but in my view presented important issues that had not been settled but should be settled by this Court.

In some of these cases it is perhaps arguable that the alleged conflict was not "real" or "square". In most of these cases, however, it is very difficult to deny the conflict, especially where, as in this case, the court of appeals expressly differs with another court, yet certiorari is denied because the conflict is "tolerable" or "narrow," or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason. In any event, denial underlines the fact that the federal law is being administered in different ways in different parts of the country; citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to.

It is surely arguable that we should not grant more cases in one Term than we can decide in one Term. Being current in our docket is a major consideration; and it may not be wise to delay prompt review in every case, even though many of them involve issues of paramount importance, simply to overcrowd our argument docket with many other cases of lesser significance. But I suggest that we should do what we can, and it is plain enough to me that quite a number of the cases involving conflicts have been denied review but could have

been granted without presenting any danger of not being current in our docket.

Of course, even if we have taken all of the cases that we could be expected to decide, which is not the fact as I see it, there would remain those unreviewed cases that leave in place the many different interpretations and applications of the federal law as administered in the courts of appeals, an issue that merits the attention of Congress and the legal establishment.